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FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )  
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Local Exchange Carriers' Rates )  
Terms, and Conditions for ) CC Docket No. 93-162  
Expanded Interconnection for )  
Special Access )

REPLY TO COMMENTS AND OPPOSITIONS

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To: Chief, Common Carrier Bureau

Bell Atlantic's<sup>1</sup> Petition<sup>2</sup> asked the Common Carrier Bureau ("Bureau") to clarify that paragraph 17 and footnote 35 of its May 31, 1994 order were not intended to change the existing law or Commission policy regarding individual case basis ("ICB") services.<sup>3</sup> The comments demonstrate that the Bureau's intent remains unclear and that clarification is needed.

ALTS, for example, contends that the Bureau intended to address only a limited subset of ICB offerings, but it then quotes the Bureau's own language, which is broadly stated to cover all ICB offerings, not just those applicable to expanded

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<sup>1</sup> The Bell Atlantic telephone companies ("Bell Atlantic") are Bell Atlantic-Delaware, Inc.; Bell Atlantic-Maryland, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; Bell Atlantic-Washington, D.C., Inc.; and Bell Atlantic-West Virginia, Inc.

<sup>2</sup> Petition for Clarification (filed June 30, 1994).

<sup>3</sup> **Supplemental Designation Order and Order to Show Cause**, 9 FCC Rcd 2742 at ¶ 17 and n.35 (1994) ("Order").

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interconnection service.<sup>4</sup> Similarly, MCI claims that the expanded interconnection services addressed in the present case are in some way distinguishable from the dark fiber services which were the subject of recent litigation regarding the scope of ICB offerings.<sup>5</sup> MCI, like ALTS, ignores the general, all-encompassing language of the Bureau's order. By contrast, U S WEST finds the Bureau's language unclear, at best, and suggests that it should be clarified,<sup>6</sup> while Southwestern Bell finds the Order directly at odds with current law.<sup>7</sup> Accordingly, even if the Bureau intended paragraph 17 and footnote 35 of the Order to be limited to the particular circumstances of expanded interconnection, the pleadings show that the language is sufficiently unclear that the Bureau should clarify its intention.

As U S WEST suggests, the Bureau can eliminate this confusion with a narrow clarification.<sup>8</sup> It can acknowledge that some ICB services are limited offerings to one or a very few

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<sup>4</sup> Comments on Bell Atlantic's Petition for Clarification by the Association for Local Telecommunications Services ("ALTS") at 3. The Order refers to "typical" tariffing practices "[i]n the telecommunications industry" and the Commission's overall policy regarding ICB offerings. Order at ¶ 17.

<sup>5</sup> MCI Telecommunications Corporation, Comments ("MCI") at 4-5.

<sup>6</sup> US WEST Communications, Inc., Comments on Petition for Clarification ("U S WEST").

<sup>7</sup> Comments of Southwestern Bell Telephone Company ("Southwestern Bell").

<sup>8</sup> U S WEST at 3-4.

customers. Others are experimental offerings, often based on new technology, that may never become commercially viable. In both cases, there is no "holding out" to the general public, or a subset of the public, and thus no offering of a common carrier service. As the D.C. Circuit recently held,

Whether an entity in a given case is to be considered a common carrier or a private carrier turns on the particular practice under surveillance. If the carrier chooses its clients on an individual basis and determines in each particular case "whether and on what terms to serve" and there is no specific regulatory compulsion to serve all indifferently, the entity is a private carrier for that particular service and the Commission is not at liberty to subject the entity to regulation as a common carrier.<sup>9</sup>

By contrast, once an ICB service is being offered to a significant number of customers, as the Commission found was the case with DS3 special access service,<sup>10</sup> the Commission can reasonably find that the carrier is holding the service out to the general public. In that event, the service is subject to all the common carrier requirements of Title II of the Communications Act. But until this voluntary holding out occurs, the Commission cannot magically convert private carriage service into common carriage. To attempt to do so would violate established

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<sup>9</sup> ***Southwestern Bell Telephone Company v. FCC***, Nos. 91-1416 ***et al.*** (D.C. Cir. April 5, 1994) ("Dark Fiber Case"), slip op. at 15. ***See, also National Association of Regulatory Utility Commissioners v. F.C.C.***, 533 F.2d 601, 608-09 (D.C. Cir. 1976); ***National Association of Regulatory Utility Commissioners v. F.C.C.***, 525 F.2d 630, 643 (D.C. Cir. 1976).

<sup>10</sup> ***Local Exchange Carriers' Individual Case Basis DS3 Service Offerings***, 4 FCC Rcd 8634 (1989).

precedent and raise serious Constitutional issues under the Fifth Amendment.<sup>11</sup>

In addition, the Commission should reject attempts of some parties to relitigate their loss in the Dark Fiber Case. There, the U.S. Court of Appeals found that the Commission had not justified treatment of a limited ICB dark fiber service as a generally-available, common carrier offering. It found that the Commission had previously determined that not all ICB services, even if tariffed, are common carrier offerings,<sup>12</sup> citing language from a 1984 Commission rulemaking notice<sup>13</sup> and the 1990 Price Cap order.<sup>14</sup> While some of the parties clearly do not agree with the court's findings, its decision is no longer subject to further review and is, therefore, final. The Bureau should disregard the parties' attempts to reargue here positions already lost on appeal.

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<sup>11</sup> *See, e.g., Dolan v. City of Tigard*, 114 S.Ct 2309, 129 L.Ed.2d 304 (1994).

<sup>12</sup> Dark Fiber Case, slip op. at 18-19.

<sup>13</sup> *Special Construction of Lines and Special Service Arrangements Provided by Common Carriers*, 97 F.C.C.2d 978, 982 (1984).

<sup>14</sup> *Policy and Rules Concerning Rates for Dominant Carriers*, 5 FCC Rcd 6786, 6810 ¶ 193 (1990).

Accordingly, the Commission should grant Bell Atlantic's petition and issue the requested clarification.

Respectfully submitted,

**The Bell Atlantic Telephone  
Companies**

By Their Attorney

A handwritten signature in dark ink, appearing to read "Lawrence W. Katz", is written over a horizontal line.

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September 13, 1994

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing "Reply to Comments and Oppositions" was served this 13th day of September, 1994, by first class mail, postage prepaid, on the parties on the attached list.

  
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